IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 98 OF 2004.

Mr. Pramod Walke,
son of Mr. Balchandra Walke,
34 years of age,
Bachelor, Indian National,
resident of H.No. 467,
Temar Wado, Assagao,
Bardez, Goa. ... Applicant.

VERSUS

1. State.

2. Public Prosecutor
(Deleted as per Order
dated 29.4.2004). ... Respondents.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Applicant.

Shri S.N. Sardessai, Public Prosecutor for the State/ Respondent.

CORAM: N. A. BRITTO, J.

DATE: 29TH JULY, 2004.

ORAL JUDGMENT:

The applicant was accused in C.C. No.362/2002/B and has been convicted under Section 10 r/w Section 6 (though specifically not mentioned) of the Madhya Pradesh Control of Music and Noises Act, Samvat 2008 (Act, for short) and whose conviction has been upheld by the learned Sessions Judge, Panaji by his Judgment and Order dated 20.2.2004.

2. The applicant has now invoked the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (Code, for short).

3. Since second revision is barred under the provisions of sub-section (3) of Section 397 of the Code, Shri Lotlikar, the learned senior counsel of the applicant/accused placed reliance on the case of **Jitender Kumar Jain v. State of Delhi and others** [(1998) 8 S.C.C. 770] in support of the proposition that this Court can invoke its jurisdiction under S.482 of the Code, notwithstanding that sub-section (3) of S.397 of the Code has created a bar in maintaining a second revision petition before this Court, the first revision petition of the applicant/accused having failed before the learned Sessions Judge, Panaji.

4. The controversy that the powers under S.482 of the Code can be independently exercised inspite of the said bar of sub-section (3) of Section 397 of the Code, is no longer res integra.

5. On behalf of the respondent, reliance has been placed on the judgment of a Division Bench of this Court in the case of **Madhavlal Narayanlal Pittie v. Chandrashekhar Chaturvedi and others** (1976 Cri. L.J. 1604). However, in my opinion, the said decision is of no assistance to the respondent to decide the controversy we are faced with.

6. Initially the Hon'ble Supreme Court in the

case of **Rajan Kumar Machananda v. State of Karnataka** (1990 S.C.C. 537) had held the view that sub-section (3) of S.397 of the Code could not be circumvented by invoking the inherent jurisdiction under Section 482 of the Code. The same view was also held by the Hon'ble Supreme Court in the case of **Deepti @ Arati Rai v. Akhil Rai & Ors.** (1995(3) Crimes, 818). However, subsequently, the said two decisions of the two learned Judges of the Hon'ble Supreme Court were distinguished in the case of **Krishnan & Anr. v. Krishnaveni & Anr.**[1997 (1) Crimes 97 (SC)] wherein a Bench consisting of three learned Judges of the Hon'ble Supreme Court held that the inherent power of the High Court under S.482 of the Code was still available notwithstanding the prohibition of sub-section (3) of S.397 of the Code. The same view has now been reiterated in the case of **Jitender Kumar Jain** (supra) relied upon by Shri Lotlikar, the learned senior counsel of the applicant.

7. There is no doubt that the power saved under S.482 of the Code is an exceptional power to be exercised exceptionally and in rare cases. It may be exercised as the very Section 482 of the Code stipulates to prevent abuse of the process of Court or otherwise to secure the ends of justice. Likewise it also can be exercised to prevent miscarriage of

justice, like the case at hand. It has been the consistent view of the hon'ble Supreme Court that the power under S.482 can be exercised where the allegations even if accepted on their face value and in their entirety, do not constitute the offence as alleged. This principle was recognized as early as in the case of **R.P. Kapur v. State of Punjab** (A.I.R. 1960 SC 866) and reiterated as late as in the case of **State of Madhya Pradesh v. Awadh Kishore Gupta and Ors.** (2004 (2) Crimes 310). In my opinion this is a fit case to exercise the power under S.482 of the Code. I say so because it is now well settled proposition of law that this Court could be justified in invoking its jurisdiction under S.482 of the Code in appropriate cases.

8. Coming to the merits of the case, it was the case of the prosecution that on 27.2.2004 at about 11.15 hrs. the applicant/accused was found playing amplified music without the permission of the competent authority at Shore Bar at Anjuna, Bardez. All the witnesses examined in support of the said charge against the accused deposed of an incident which took place either at 11.00 p.m. or 11.20 p.m.

9. Section 10 of the Act deals with penalty and provides that whoever contravenes or attempts to

contravene or abets the contravention of any of the provisions of this Act or acts contrary to any order lawfully made under this Act shall be punished with imprisonment of either description for a term which may extend to one month or with fine not exceeding one hundred rupees or with both. In fact, the accused has been sentenced under S.10 of the Act to pay a fine of Rs.50/- only, in default to undergo S.I. for two days.

10. Section 6 of the Act which, according to the prosecution, the applicant/accused violated, deals with the use of loud-speakers or amplifiers. Sub-section (1) thereof provides that no loud-speaker or sound amplifier shall be used for broadcasting any speech, sermon, music or radio programme or attached to any wireless receiving set or gramophone, after midnight and before 4 a.m. in the morning (emphasis supplied).

Sub-section (2) of Section 6 of the Act provides that no person shall use such loud-speaker or sound amplifier in a public place for the purpose of amplifying songs, ballad, or words which are obscene, or are likely to affect adversely the morality of the public in general.

11. Section 3 of the Act also prohibits music other than soft music produced by instruments at

certain places and at certain hours. However, the prohibition is after midnight and before 4 a.m. Likewise section 4 also prohibits music in a place between midnight and 4 a.m. in the morning.

12. Admittedly, and as already stated, the applicant/accused was found playing amplified music at the time which was prior to midnight i.e. around 11 or 11.20 p.m. The question which was required to be answered by both the courts below and which question has otherwise been totally lost sight of by both the courts below is whether the playing music at that time constituted an offence punishable under S.10 r/w section 6 of the Act ?

13. At the cost of repetition, it may be stated that the applicant/accused was entitled to play music with amplifier as long as it was not being played after midnight and before 4 a.m.

Having realised this situation, Shri Sardessai, the learned P.P. has referred to Section 5 of the Act and has produced Notification No.LD/N/79/66 dated 17.11.66 and letter dated 6.3.98 issued by the Under Secretary (Home) to both the District Magistrates in Goa.

Shri Sardessai has also placed reliance on the orders passed by this Court dated 18.1.2000 and 31.1.2000 in W.P. No.366/99 and a letter dated 2.2.2000 by which the said orders were communicated to both the District Magistrates. These are not at all relevant to this case.

14. Section 5 of the Act deals with prohibition of nocturnal noises in certain areas and localities. It reads as follows :-

" The District Magistrate or other officer empowered by the Administrator in this behalf may, in his discretion, declare any noise to be a nocturnal noise and prohibit it by notice given in such manner during such hours of the night and at such places as he thinks fit. "

15. By virtue of Notification No.LD/N79/66 dated 17.11.1966 the Administrator was pleased to empower and authorise the Sub-Divisional Magistrate in the then District of Goa to exercise the powers of a District Magistrate under Sections 5, 7 and 8 of the Act. By letter dated 6.3.1998 the Under Secretary (Home) informed the District Magistrates of both the Districts that the State Government had decided to restrict the timings for the use of loud speakers and amplified

sound upto midnight in all places from October to February and for the remaining period such sound/music may not be allowed beyond 10.00 p.m. and relaxation of the same in any individual case may be allowed by written permission to be obtained from the District Magistrate, ADM/SDM. Shri Sardessai was repeatedly asked to produce before the court any order issued by any District Magistrate or for that matter by the ADM or SDM pursuant to the said instructions given to them by virtue of letter dated 6.3.98 and prohibiting in terms of Section 5 of the Act music being played or nocturnal noise being made after 10 p.m. Shri Sardessai has not been able to produce any such Notification and, in the absence of such a Notification having been issued by the District Magistrate or for that matter by the ADM or the concerned SDM prohibiting music being played after 10.00 p.m. in my opinion, the applicant/accused was within his right to play amplified music as long as the applicant/accused did not do the same after midnight and before 4.00 a.m. The learned J.M.F.C. and so also the learned Sessions Judge have completely failed to apply their minds to the facts stated by the prosecution witnesses. Even if the said facts were accepted on the whole, no offence was at all disclosed against the applicant/accused.

16. In my view, as already stated, this is a fit

case to exercise jurisdiction to prevent miscarriage of justice which has taken place by convicting and sentencing the accused which could not have been done on the facts proved by the prosecution even if they were accepted in its entirety.

17. This is a fit case therefore to allow the petition and set aside the order of both the courts below, which I hereby do. Consequently the accused shall stand acquitted under Section 10 read with Section 6 of the Act. The fine, if paid, shall be refunded to the applicant/accused.

N. A. BRITTO, J.

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